Dissenting Views
To the
Committee Report
On
HR 1104, the "Child Abduction Prevention Act of 2003"

We are very disappointed with the approach taken by the Majority to deal with the very serious problem of child abduction. If ever there was an issue the parties could come together on in a bipartisan way, this would seem to be it. The recent rash of child abductions clearly indicates the need to protect our children from sexual predators.

Bipartisan legislation was introduced in the House (H.R. 412)[1] and Senate (S. 121)[2] that would authorize a national AMBER Alert system to assist local and state authorities in tracking kidnappers that attempt to cross state lines. That bipartisan legislation quickly passed the Senate and it should have quickly passed the House and been sent on to the President. Instead, the members of this committee have been presented with a bill that includes not only the non-controversial AMBER Alert provisions, but several far more controversial provisions. These additional provisions include two new death penalty offenses, new mandatory minimum sentences, extensions of the use of wiretaps, lifetime supervision, elimination of the statute of limitations, a provision that denies pre-trial release for certain accused persons, and several other extraneous provisions.

Our principal concern with H.R. 1104 is that it is bogged down with controversial provisions that will, at a minimum, delay enaction of the very important and time sensitive AMBER Alert provisions of the bill, and may prevent their enaction entirely. Indeed, the Senate has had the opportunity to act on several of the controversial provisions in this bill for the past three Congresses and has chosen not to on each occasion. For this reason, in the last Congress we advised the Majority that the inclusion of these provisions with the AMBER Alert system would doom it, and we were right -- it did. Nothing suggests any different fate for that approach this time.

Beyond this general and overarching concern, we have specific concerns about many of the extraneous provisions included in H.R. 1104. One of the more controversial measures in the bill is the "Two Strikes, You're Out" provision (sec. 106) which calls for a mandatory life sentence without parole for a second violation of certain sex offenses involving a minor. While this measure was amended during Committee markup to drop the provision mandating life

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[1] H.R. 412, the National AMBER Alert Network Act of 2003 was introduced on January 28, 2003, by Representatives Frost and Dunn. The bill currently has 168 cosponsors.

[2] S. 121, the National AMBER Alert Network Act of 2003 was introduced on January 9, 2003, by Senators Feinstein and Hutchinson. The bill unanimously passed the Senate less than two weeks later on January 21, 2003.

without parole for a second consensual sex offense, such as high school students touching each other's private parts, the bill retains this draconian consequence for other such offenses, including offenses which currently call for a maximum sentence of no more than 3 years for a second offense[3].

Also among the controversial provisions in the bill is one that repeals the statute of limitations for sex offenses (sec. 202), including circumstances where the underlying offense is a misdemeanor between consenting adults[4] and offenses (such as sexual touching) now subject to punishment of no more than 3 years for a second offense[5]. This provision permits the prosecution of an individual for relatively minor offenses many years after evidence and memories have become stale, and is likely to lead to manipulations and injustices. For example, to gain advantage in a bitter divorce and custody dispute, one spouse could raise and establish that the other spouse, many years earlier, committed a federal felony by traveling across state lines to commit a misdemeanor sex offense with him or her.

Yet another controversial provision in the bill seeks to eliminate the opportunity for pretrial release on bail of persons accused of any one of several enumerated sex offenses (sec. 221). Curiously, the Majority amended the bill during Committee markup to remove consensual violations involving a teenage minor[6] and sexual contact offenses between adults[7], while adding consensual sex offenses between adults.[8]

Additionally, the bill includes provisions which extend federal wiretap authority (sec. 201). Federal wiretap authority, because of its intrusive nature, was originally designed to be used only in the most serious cases and only then as a last resort for effective law enforcement. Under the terms of the bill, however, FBI wiretap authority is extended to include investigations of sexual acts between consenting adults and sexually explicit computer generated images that do not involve real children, despite the fact that the U.S. Supreme Court recently ruled that creation and possession of such images does not constitute a crime.

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[3] The bill includes violations of 18 U.S.C. 2244(a)(2) which includes touching of private parts.

[4] The bill includes violations of 18 U.S.C. 2421 (crossing state lines to commit any illegal sexual activity, or attempting to do so, including, for example, traveling from the District of Columbia to Virginia to commit misdemeanor offenses such as fornication or adultery) and 18 U.S.C. 2422 (includes adults persuading, inducing or enticing other adults to cross state lines to commit fornication or adultery)

[5] This provision also includes violations of 18 U.S.C. 2244(a)(2).

[6] The amendment removed 18 U.S.C. 2243(a) from inclusion under this provision.

[7] The amendment removed 18 U.S.C. 2244(a)(2) from inclusion under this provision.

[8] The amendment added violations such as adult consensual violations of 18 U.S.C. 2421 and 2422.

Viewing several of the foregoing provisions together, it would be entirely possible that many years after the commission of an underlying offense constituting a misdemeanor by consenting adults, one of the adults, or both depending upon the circumstances, could be subjected to a wiretap, arrested on a federal felony charge, be denied bail on the charge, and if convicted, be placed under supervision for life.

Moreover, the bill establishes two new death penalty offenses (sec. 102). The Majority knows that many on this side of the aisle cannot, as a matter of principal, support the death penalty and mandatory minimum sentences, particularly with all of the problems we have seen in these areas in this country. As many people now know, our current death penalty system is riddled with several flaws -- namely, the unacceptably high rate of wrongful convictions, inadequate legal representation and a system that is applied in a racially discriminatory manner.

Indeed, after 13 people were released from death row in Illinois following determinations that they were innocent of the crimes for which they had been tried and convicted, Governor Ryan of Illinois, realizing that there were significant problems with the death penalty in the state, declared a moratorium on executions. He took this extraordinary step to seek reassurances that the system worked reliably in determining an individual's innocence or guilt. Before resuming executions, he also wanted to be certain that no other innocent individuals would be sentenced to death. After more than a year of study and assessment of the capital punishment system in his state, he was unable to conclude that there were sufficient safeguards during the trial, conviction and sentencing in the remaining death row cases in the state to assure that none were wrongfully sentenced to death. As a result, he commuted the sentences of the remaining death row inmates to life in prison

Some death penalty proponents have argued that the problems discovered in Illinois were highly unusual. In fact, the error rate in Illinois is 66%, slightly lower than the national average of 68%.

Problems with the bill's mandatory minimum provisions (sec. 103 & 104) are equally troubling. Mandatory minimum sentences have been studied extensively and have been shown to 1) be ineffective in preventing crime, 2) distort the sentencing process and 3) be a considerable waste of the taxpayers' money. Weighing in on this issue, Chief Justice Rehnquist, who is not generally known to be lenient on crime, has stated that, "mandatory minimums... are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.' Just as frequently, they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole...". When scholars, justices and policy analysts all agree and oppose such controversial provisions, the Majority's inclusion of these policies clearly indicates that it has gone out of its way to load the bill up and make it more difficult for some Members to support this legislation.

We would also note that provisions in the bill concerning supervised release terms and sex tourism are not without controversy. We would again note that whatever the merits or demerits of these matters, they are best handled in separate legislation, rather than though the AMBER Alert vehicle. The provision concerning supervised release terms (sec. 101) would grant judges the discretion to extend the term of post-release supervision for sex offenses up to a maximum of

life would apply so broadly that it would include an offense whose term of imprisonment is currently a maximum of three years. The provision extending the reach of the sex tourism law (sec. 105) goes so far as to make it a criminal offense for an individual to travel abroad and have sex with a minor even if the defendant did not travel with such intent. Provisions such as this bring us far beyond the core AMBER Alert issue.

In addition, the impact of H.R. 1104, as presently constituted, will have a grossly unfair impact on Native Americans. Since the provisions only apply where there is federal jurisdiction, approximately 75% of those subject to the new draconian penalties will be Native Americans residing on reservations.

We also cannot agree that the technical changes made by the Majority at markup remedy some sort of egregious drafting "errors" in the Senate bill and somehow justify not permitting the House to vote on the Senate passed clean AMBER Alert bill. With no advance notice to the Minority, the Majority offered two amendments to make these so-called "fixes."

The first such amendment, offered by the Crime Subcommittee Chairman, would strike an existing grant program in the bill, which would require the Secretary of Transportation to carry out a program to provide grants to States for the development or enhancement of notification or communications systems along highways for alerts and other information for the recovery of abducted children. This provision would have allowed the Secretary of Transportation to provide grants to states for any purpose consistent with the goals of the program. The Majority's amendment replaced that provision with language that narrowed the permissible uses of the grant money. This amendment could work counter to its own stated rationale: while its stated purpose was to insure that existing programs were covered by the bill's language, it actually narrowed the scope of existing programs that could be covered. In any event, the language in the Senate passed bill gives the Secretary of Transportation more than adequate authority to insure that any existing AMBER programs continue to be funded and utilized.

In addition, the Majority sought to make much of the fact that this amendment permits DOT to pay for up to 80% of an AMBER program, rather than 50% under the Senate bill, and that this conformed the bill to current DOT procedures. Lost in the discussion was the fact that the DOT program was only announced on February 6,[9] and could quite easily be configured to conform to Senate passed bill. As a matter of fact, not a single grant application has even been received by the Department as of today, let alone a grant acted on. So again, it is impossible that the 50% matching requirement could disturb any existing grant whatsoever. Beyond that, given the limited funds available in the current budget environment, it is quite obvious that the 50% requirement would permit the funds to go much farther and benefit more children and families.

The second such amendment, offered by Chairman Sensenbrenner, would require that law enforcement agencies also disseminate, to the maximum extent practicable, information related to special needs children to law enforcement, public health and other public officials. It was asserted that this amendment would place health care professionals on the alert for missing children with medical problems who may be brought to hospitals by their captors for medical attention. This

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[9]Fed. Reg. Feb. 12, 2003, Vol. 68, No. 29, Pg. 7164-67.

amendment may also conceivably be counterproductive – it is quite possible a captor will be more likely to deny a child access to medical care if he believes that a consequence of providing such access is that a doctor will alert law enforcement officials as to the child's whereabouts. In any event, we believe this change can easily be handled by the various departments and agencies that will implement the AMBER Alert law and hardly justifies delaying the passage of the clean AMBER legislation. Again, neither of these two "technical" amendments rise to the level that they warrant delaying passage of the Senate passed AMBER Alert bill.

Conclusion

We believe it is unnecessary and counterproductive to weigh down the AMBER Alert provision with the highly controversial measures described above.

Similar sentiments, on this point, have been echoed by Ed Smart, the father of Elizabeth Smart; various child advocacy groups, including the Polly Klaas Foundation; California Governor Gray Davis, Virginia Governor Mark Warner and Sen. Kay Bailey Hutchison (R-TX) who have all called upon the House to enact an AMBER Alert bill unencumbered by proposals which will prevent it from being quickly signed into law.

During a recent press conference on this issue, Sen. Hutchison pleaded with the Majority to "consider letting [her] bill go."[10] In a joint letter, Governors Davis and Warner urge House leaders to quickly enact an AMBER Alert bill "unfettered by additional proposals".[11] In weighing in on the issue, the Klaas Foundation emphatically declared that, "the Senate quickly passed a stand-alone AMBER Alert bill months ago, and the House should do the same now."[12] And in a statement released by Mr. Smart, he confirms that H.R. 1104 "is encumbered by its size and complexity" which explains why "..passing AMBER Alert as stand alone legislation is critical."[13]

Unfortunately, in demonstrating its unwillingness to compromise, the Majority refused a request in a March 17, 2003, letter to Chairman Sensenbrenner signed by all the Democratic members of the Committee to add S. 121, the Senate-passed "National AMBER Alert Network Act of 2003", as an agenda item to the Judiciary Committee's markup scheduled for Tuesday, March 18, 2003, so that provision could move forward. We would urge the Majority to reconsider this decision and allow the Members to vote on a clean AMBER Alert bill.

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[10] Press Conference with Senators Hutchison and Feinstein in Washington, DC. (March 13, 2003). Transcript provided by CNN.

[11] Letter from Governors Gray Davis (CA) and Mark Warner (VA) to James Sensenbrenner, Chairman of the House Judiciary Committee (March 18, 2003).

[12] Press Release, The Polly Klaas Foundation, The PKF Urges Congress to Immediately Pass H.R. 412 as a Freestanding Bill (Date Not Specified).

[13] Press Release, Ed Smart, Regarding the National AMBER Alert Network Act (March 13, 2003).

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